No. 91-1721

In The
Supreme Court of the United States
October Term, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF FLORIDA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Public Citizen, American Civil Liberties Union, and ACLU of Florida are membership organizations that frequently challenge the legality and constitutionality of governmental action in the federal courts. In such litigation, the doctrine of standing is often raised as a bar to suit. *Amici* submit this brief because they believe that the decision of the Eleventh Circuit contravenes settled principles of standing established in this Court's decisions and erroneously constricts petitioner's right to challenge the constitutionality of the municipal action at issue in this case. *Amici* strongly oppose petitioner's claim on the merits, and believe that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), on which petitioner's claim is based,

was wrongly decided as a matter of constitutional law. However, *amici* also believe that constitutional claims should not be dismissed by closing the courthouse doors to those with contrary views, and that the doctrine of standing is not a proper basis for dismissal of this suit. Letters of consent to the filing of this brief have been submitted to the Clerk of the Court.

PRIOR PROCEEDINGS

This case presents a constitutional challenge to sections 126.601-613 of the former City of Jacksonville Purchasing Code (Former Code), which required that ten percent of the City's contracts for capital improvements, supplies, contractual services, and professional services be set aside in every fiscal year for minority business enterprises (MBEs). The City's Chief Purchasing Officer was made responsible for identifying the contracts to be set aside in each category. After the Mayor's approval of the Chief Purchasing Officer's decisions, the set aside contracts were reserved for "minority business enterprises only," to be awarded "directly to minority business enterprises." Former Code § 126.604(c). The Former Code also contained various possibilities for a waiver or reduction of the set-aside requirements in light of, for example, the limited availability of MBEs in the contracting specialties, or the additional cost to the City of using MBEs. Former Code § 126.608.

On April 4, 1989, petitioner, an association of contractors with nonminority members that would not qualify for contracts set aside under the MBE program, filed suit against the City, asserting that the MBE program violated the Equal Protection Clause of the Fourteenth Amendment. The complaint alleged that petitioner's nonminority members would have bid on contracts reserved for MBEs, had the MBE program not been in place. Two days after the complaint was filed, the District Court issued a temporary restraining order, and, two weeks after that, issued a preliminary injunction against enforcement of the MBE program. A year later, the

preliminary injunction was reversed by the Court of Appeals for the Eleventh Circuit, which concluded that petitioner had not shown irreparable harm, because monetary relief would provide its members with an adequate remedy for any constitutional violation that might ultimately be established. *Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). Chief Judge Tjoflat concurred specially on the ground that petitioner lacked standing, because, *inter alia*, it had not shown that any specific contract would have been awarded to any of its nonminority members absent the set-aside program. *Id.* at 1287-88.

On remand, the District Court granted summary judgment for petitioner and enjoined further enforcement of the ordinance. The Court of Appeals again reversed, this time adopting Chief Judge Tjoflat's view that petitioner lacked standing. In doing so, the Court emphasized that petitioner had not shown that any of its members would have bid successfully for a particular set-aside contract, but for the MBE program. *See Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992). This Court granted certiorari on October 5, 1992.

On October 27, 1992, the City Council of Jacksonville enacted an ordinance repealing the MBE program challenged in this suit and enacting a new African-American and Women's Business Enterprise Program. Ordinance No. 92-1269-1132, *to be codified in part at* Jacksonville Purchasing Code § 126.601-.617 (New Code). The ordinance became effective the next day, upon the Mayor's signature. The New Code establishes separate "participation policy goals" in four kinds of City contracts for business enterprises owned by African-Americans and Women (AWBEs), New Code § 126.604(a), and states that these goals "shall be used as guidelines and shall not be construed as a ceiling or floor" to AWBE participation, *id.* § 126.604(c). The New Code puts in place four alternative methods of achieving the participation goals, *viz.*, by

awarding a contract to the lowest responsible bidder who meets specific participation percentages or has made a good faith effort to do so, by setting aside contracts for bidding only by AWBEs when there are at least two AWBEs available to perform the contract, by directly negotiating small professional-service contracts with AWBEs, and by granting a bid preference for AWBEs. New Code § 126.605. The New Code also contains various provisions for a waiver or modification of the participation percentage goals.[1]

SUMMARY OF ARGUMENT

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), this Court ruled that a party challenging the constitutionality of a government requirement for obtaining a desired benefit as racially discriminatory need not show, as a condition of standing to sue, that it would have obtained the benefit, but for the exclusionary practice. Fundamental fairness requires that this principle apply equally to all litigants, regardless of the side they are taking in any particular controversy. The decision below must be reversed because it disregards this rule of even-handedness, which is essential to any proper application of the standing doctrine.

ARGUMENT

The rules of standing ensure that "a party has a sufficient stake in an otherwise justiciable controversy to obtain [its] judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). Those rules are a threshold for consideration of a case on the merits, not a substitute for it. As this Court has observed, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Thus, the gist of the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). A plaintiff who has a sufficient stake in the outcome to meet the requirements of Article III is entitled to go forward. Whether the plaintiff can prevail on the merits is, of course, an entirely different question.

Here, petitioner's claim on the merits is that Jacksonville's MBE set-aside program is inconsistent with this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Amici* believe that the decision in *Croson* is fundamentally flawed in its failure to recognize a constitutional distinction between programs designed to perpetuate past discrimination and those designed to eliminate its remaining vestiges. But *amici* believe with equal conviction that the answer to the constitutional dispute over set-aside programs does not lie in closing the courthouse door to those seeking redress for their injuries.[2]

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[1] *Amici* recognize that the City's recent repeal of its old set-aside program and enactment of a quite different program based on participation percentage goals raise a substantial question whether a live controversy remains in this case. Nevertheless, *amici* submit this brief in case the Court reaches the standing issue, because of our belief that the standing decisions of the Eleventh Circuit are incorrect.

[2] The term "injury" in this context must be carefully defined. *Amici* agree that petitioner has alleged an injury in fact sufficient to confer standing. *Amici* do not agree that the competitive disadvantage that petitioner has alleged rises to the level of a constitutional injury under the appropriate equal protection analysis. Specifically, *amici* disagree with the strict scrutiny test adopted in *Croson*. As Justice Brennan has noted, "whites as a class [do not] have any of the 'traditional indicia of suspectness: the class is not saddled with such

(continued...)

The decision below dismisses a constitutional challenge that we, as *amici*, would be likely to resist if and when a court reached the merits of the challenge. In our view, however, it rejects petitioner's claims through the wrong means. The decision below does more than foreclose these claims; it reflects a cramped conception of standing that can and will deny a legitimate day in court to other litigants, some of whom we represent and some of whom we oppose. In any event, the decision cannot be reconciled with the relevant decisions of this Court or with our constitutional traditions.

Specifically, the decision below conflicts directly with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, a white man who had been denied admission to a state medical school alleged that the school's practice of reserving 16 of 100 places in its entering class for minority applicants denied him the equal protection of the laws. In this Court, several *amici* suggested that Bakke lacked standing to sue because he had not shown that he would have been admitted to the medical school, but for the special admissions program for minority applicants.[3] This Court rejected that contention:

[2](...continued)
disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Bakke*, 438 U.S. at 357 (opinion concurring in judgment in part and dissenting in part) (citations omitted).

[3] The California Superior Court had refused to order Bakke's admission on that ground, even though it ruled that the special admissions program violated the Equal Protection Clause. 438 U.S. at 279. The California Supreme Court affirmed the Superior Court's holding that the admissions program was unconstitutional and placed the burden of proof on the school to show that Bakke would not have been admitted absent the program. The school subsequently conceded that it could not carry this burden, *id.* at 280, but this Court noted that Bakke would have had standing even absent this concession, *id.* at 280-81 n.14.

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by a favorable decision of his claim. . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

438 U.S. at 280-81 n.14 (citation omitted). Thus, this Court found Article III jurisdiction satisfied by Bakke's claim of injury in not being permitted to compete for all the positions in the entering class.[4]

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), a residential property developer seeking to build housing for low- and moderate-income residents challenged a municipality's zoning practices, alleging that the defendant's refusal to rezone land from single-family to multiple-family use was racially discriminatory. The village challenged the developer's standing to sue, arguing that

[4] This Court subsequently cited *Bakke* as good law in *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982). However, in light of *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), it may be questioned whether this aspect of *Bakke* is dictum. *ASARCO* makes clear that the University of California would have had standing to seek this Court's review of the California Supreme Court's adverse judgment, even if Bakke had not had standing to sue in the first place, and that the University's standing would have been sufficient to sustain this Court's Article III jurisdiction. It might also be argued that, under *ASARCO*, the University's standing would have been necessary for jurisdiction. Nevertheless, this Court did hold that Bakke had standing, and that his standing was sufficient for Article III jurisdiction. That holding should be reaffirmed.

the project's assumed source of government funding had been eliminated, and that many contingencies stood between the zoning decision and the eventual construction of the project. This Court agreed that "[a]n injunction would not, of course, guarantee that [the housing project] will be built," 429 U.S. at 261, but concluded that the developer's wish to proceed with plans for a specific project was an adequate factual predicate for the personal stake in the controversy necessary to support Article III standing, whether or not the eventual construction of the project was assured. *Id.*

In other cases, this Court has not questioned the standing of plaintiffs to challenge exclusionary zoning and housing practices that burdened minority and low-income persons, even though there was no showing that those persons would necessarily be able to find the desired housing absent the allegedly discriminatory practice. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969) (challenge to city charter amendment restricting fair housing ordinance; no showing that plaintiff would be able to purchase desired housing); *James v. Valtierra*, 402 U.S. 137 (1971) (challenge to referendum restricting low-cost housing proposals; no showing that plaintiffs would necessarily obtain such housing absent referendum); *cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *id.* at 10 (Brennan, J., dissenting) (challenge to law against occupancy of houses by unrelated family members; no showing that landlords would be able to rent house in the future to tenants excluded by the ordinance); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (challenge by tenants to landlord's discriminatory rental practices, on ground that it prevented nonwhite persons from becoming neighbors; no showing that specific nonwhites were interested in renting apartments).

These decisions are in harmony with this Court's general standing principles. At the core of these decisions is the issue of redressability; in every case, the plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). But, as this Court has made clear, the doctrine of standing does not require the plaintiff to show that a favorable decision will relieve "his *every* injury." *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) (citing *Bakke*). Rather, the plaintiff need show only that a favorable decision will be likely to remove *an obstacle* to its obtaining an ultimate goal — be it the award of a government benefit, or the achievement of some other goal, which is impeded by the challenged governmental action. *Id.*; *see Duke Power Co. v. Carolina Env'tal Study Group*, 438 U.S. 59, 75 n.20 (1978) (no more than "substantial likelihood" of redress required). No "[s]peculative inferences," *Simon*, 426 U.S. at 45, are necessary here; if the Jacksonville set-aside program is invalidated, then petitioner's members will be able to compete for a larger number of Jacksonville contracts than at present, and that will make it more likely that they will be awarded such contracts in the future.

This Court has frequently found standing in parties who challenged the legality of a governmental action or regulation that stood as an obstacle to their achieving a goal, even where there was no showing that the removal of that obstacle would make accomplishment of their ultimate goal a certainty. For example, in *Bryant v. Yellen*, 447 U.S. 352 (1980), farmworkers in the Imperial Valley of California intervened in a lawsuit between the United States and California to seek a declaratory judgment that a federal statute prohibited delivery of reclamation project water to any privately owned irrigable land in excess of 160 acres. The farmworkers desired to purchase land in the Valley, and they believed that if the statute were construed as they believed it should be, landowners who held more than 160 acres would place excess land on the market. Relying on *Arlington Heights*, *supra*, this Court ruled that the farmworkers had standing, "even though they could not with certainty establish that they would be able to purchase excess lands if [the statute] were held applicable." 447 U.S. at 367.

In *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), the Court ruled that California had standing to challenge the Department of Interior's refusal to employ experimental methods of awarding leases for offshore oil drilling, as violative of a federal statute. The Interior Department argued that California had no standing to sue because, even if the Department were statutorily required to use the experimental methods in some cases, there was nothing to indicate that the Department would try these systems on parcels leased off the California coast. *Id.* at 161. This Court rejected the Government's standing defense because a ruling in California's favor would have made it more likely, albeit not certain, that the Government would use the experimental methods favored by California. *Id.* at 161-62.

Similarly, this Court has never required plaintiffs who challenge procedural irregularities in government programs to show that they would undoubtedly achieve their ultimate goal, but for those irregularities. For example, in *McNary v. Haitian Refugee Center*, 111 S. Ct. 888, 895 (1991), the Court observed that undocumented aliens challenging the Government's procedures for awarding special agricultural worker (SAW) status had alleged injury in fact, even though the aliens were challenging only the procedures used, and not any determination that any individual alien was entitled to SAW status. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (violation of procedural due process in suspension from public school is compensable by nominal damages, even if student's suspension is substantively justified).

Despite this substantial and consistent body of law, the Eleventh Circuit has held, in a series of cases culminating in the decision below, that a contractor bringing an Equal Protection challenge to a minority preference program for municipal contracts must show that it would have been awarded one of the contracts, but for the preference program. *See Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992); *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190, 1204-07 (11th Cir. 1991); *S.J. Groves & Sons v. Fulton County*, 920 F.2d 752, 758 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991). This conclusion rests ultimately on an erroneous reading of *Warth v. Seldin*, 422 U.S. 490 (1975).[5]

Relying squarely on *Warth*, the Eleventh Circuit suggested in *S.J. Groves* that a contractor must be able to point to a specific contract that it would have been awarded, but for the defendant's MBE program. 920 F.2d at 758; *see also Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d at 1287 (Tjoflat, C.J., concurring) (same reading of *Warth*). That is not what this Court held in *Warth*, however. In *Warth*, the Court concluded that various parties, including property developers who wished to build low-income housing projects, lacked standing to challenge a municipality's allegedly discriminatory zoning practices. The Court did not say that the developers were required to show that the desired zoning would have been granted, or that any projects would have been built, but for the zoning ordinance and its implementation. Rather, the Court concluded that developers lacked standing to challenge the municipal zoning ordinance because they had not even shown that the municipality's zoning practices had impeded the construction of any housing project:

> [Home Builders'] complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment

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[5] In the decision below, the Eleventh Circuit concluded that it was bound by the Circuit precedent of *Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1991). *Cone*, in effect, adopted the position proposed by Chief Judge Tjoflat in his earlier concurring opinion in this case. *See Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d at 1287-88. Chief Judge Tjoflat's concurrence relied heavily on *Warth*, as did the Eleventh Circuit's decision in *S.J. Groves & Sons v. Fulton County*, 920 F.2d 752, 758 (11th Cir. 1991), *cert. denied*, 111 S. Ct. 2274 (1991).

> that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance.

422 U.S. at 516.

Notably, *Warth* did not say that if one of Home Builders' members did seek a variance that would have been denied by the municipality for discriminatory reasons, Home Builders would nevertheless not have had standing to sue, merely because that developer might eventually fail to obtain a variance for some other, unforeseen reason. Yet that is essentially petitioner's situation here. Unlike the case of Home Builders, there is no doubt that the set-aside program has "delayed or thwarted" the ability of petitioner's members to obtain contracts reserved for MBEs, even though they might not ultimately be awarded any of the contracts.

In *Warth*, the Court also held that a non-profit housing council lacked standing to sue because, with one exception, its complaint "[did] not suggest that any of these groups has focused its efforts on Penfield or has any specific plan to do so[;] . . . [n]either the complaint nor any materials of any record indicate that any member of Housing Council has taken any step toward building housing in Penfield, or has had dealings of any nature with respondents." 422 U.S. at 516-17. That holding also did not require the Housing Council to show that it would ultimately have been able to build housing in Penfield; it only required the Housing Council to show that the municipality impeded its efforts to build specific projects.

In short, what this Court required in *Warth* was that the plaintiffs demonstrate that they had taken steps towards the construction of particular projects, and that the defendants had interfered with those projects' construction — not that the projects would have been built,

or even that the zoning would have been granted, absent the alleged racial discrimination.[6]

This is not to say that petitioner has no burden under the doctrine of standing. To satisfy *Warth*, it must show that its members would bid on Jacksonville contracts reserved for MBEs under the set-aside program, and that the program substantially impedes their being awarded such contracts. On the face of its complaint, petitioner has satisfied both requirements by alleging that its members regularly bid on City contracts, some of which were reserved for MBEs under the set-aside program, and that they would bid on designated construction and procurement contracts in the future, were they not reserved for MBEs. Pet. for Cert. 10-11. Although the Former Code contained provisions for waiver and modification of the set-aside requirements, respondent did not dispute that the program substantially impeded an award

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[6] *Warth* may have required other plaintiffs, individuals who desired low-cost housing in Penfield, to show that low-cost housing would have been built, but for Penfield's alleged racial discrimination in zoning. 422 U.S. at 506. But the Court made clear that this special burden was necessary because those individuals were alleging only indirect injury, in that the zoning ordinance operated directly against the home builders, not themselves. Thus, the individual plaintiffs were required, in effect, to negate the possibility that the economics of the housing market, not Penfield's assertedly illegal acts, constricted low-income housing supply. Referring to the requirement of redressability in standing, the Court stressed that allegations of indirect injury "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Id.* at 505. Here, the contractors have alleged a direct injury against themselves caused by Jacksonville's set-aside program.

of any reserved contracts to petitioner's nonminority members.[7]

In addition, a contractor would not have standing to challenge the set-aside program if it were categorically excluded from obtaining contracts for some other, concededly valid reason. In such a case, invalidation of the set-aside program could not redress the injury to the contractor. Again, *Bakke* presents an apposite analogy. As Judge Posner has pointed out: "If a public university had a policy of not admitting any blacks to its medical school, a black would not lack standing to challenge the constitutionality of this policy merely because he might not be admitted if the policy were abandoned. But he would not have standing if he was two years old." *Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115, 1137 (7th Cir. 1983) (separate opinion) (citation omitted). Thus, a contractor that failed to meet neutrally applicable bonding requirements and would unquestionably be denied municipal contracts for that reason alone would not have standing to challenge the set-aside program.[8]

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[7] Of course, the initial standing judgment can be reversed if the evidence does not conform to the pleadings. *Warth*, 422 U.S. at 501-02. Moreover, petitioner's members are not necessarily entitled to either a judicial award of a contract or monetary relief, even if petitioner has standing and ultimately prevails on the merits of its equal protection claim. If, on remand, it appears that petitioner's members would not have won any contracts, even absent the set-aside program, then the District Court can limit the remedy to a declaratory judgment and a prohibitory injunction against future enforcement of the program. As the Court noted in *Bakke*, these issues are more appropriately addressed as questions of remedy. 438 U.S. at 281 n.14.

[8] By contrast, this Court has made clear that plaintiffs challenging a government procedure as violative of constitutional guarantees of procedural due process need not show that they would have received the desired government benefit, or would not have been sanctioned, had proper procedures been in place. This Court has recognized the denial of procedural due process as an injury, in and of itself, to an (continued...)

There may also be different standing problems presented by challenges to other kinds of minority enterprise programs. Petitioner may have to make a different showing if it seeks to challenge the constitutionality of Jacksonville's new AWBE program. In any event, this case, as it has been framed so far, presents no such complications. The only issue in this case is whether a contractor challenging a set-aside program must show that it would have been awarded a specific contract, but for the program. Under this Court's precedents, the answer is clearly that a contractor does not have to make such a showing. This Court should therefore conclude that petitioner has standing.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[8](...continued)
"absolute" right, "in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. at 266. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing ...." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

Respectfully submitted,

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